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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1947 TERM

NEW AMSTERDAM CASUALTY COMPANY,
Petitioner,

vs.

CRAIGHEAD RICE MILLING COMPANY, A CORPORATION,
Respondent.

No. 778

J. M. JACK AND L. M. JACK, A CO-PARTNERSHIP DOING BUSINESS AS JACK CONSTRUCTION COMPANY,
Petitioners,

vs.

CRAIGHEAD RICE MILLING COMPANY, A CORPORATION,
Respondent.

No._____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

LOWELL W. TAYLOR,
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Memphis, Tennessee,
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ARTHUR L. ADAMS,
Jonesboro, Arkansas,
of Counsel.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, New Amsterdam Casualty Company and J. M. Jack and L. M. Jack, a co-partnership doing business as Jack Construction Company, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eight Circuit, filed March 25, 1948 (R. 1148), which has now become final. The judgment affirmed a judgment against petitioners rendered by the United States District Court for the Eastern District of Arkansas for $150,000.00.

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The respondent is an Arkansas Corporation. Pursuant to its purpose to enter the rice drying business, it made a contract with Jack Construction Company for the construction of a reinforced concrete drier building, with storage tanks and rice drying machinery. The contract price was $350,000.00. Petitioners executed a bond in the full amount of the contract price, conditioned to respond in damages for the failure of the contractor to perform his contract in accordance with the contract, plans and specifications. The contractor entered upon the execution of the contract, and almost succeeded in completion, but not within the time prescribed. After he had furnished labor and materials and rice drying machinery in excess of $344,220.00 (R. 1090) and had turned over to respondent two of the rice drying units, which respondent accepted and used, respondent declared the

contractor in default. Respondent called upon the New Amsterdam Casualty Company, surety, to complete. It declined to complete, availing itself of a reservation in the bond. Respondent did not complete, but brought suit against the New Amsterdam Casualty Company for the full amount of the penalty of the bond.

The respondent did not make the contractor a party to the suit. The contractor filed a petition to intervene on September 20, 1946 (R. 32).

After the case was at issue, and on November 4, 1946, petitioners' counsel took the pre-trial deposition of an official of the Union Planters National Bank and Trust Company at Memphis, Tennessee. Among the papers and documents produced for examination was an instrument by the terms of which the respondent had assigned all of its claims and causes of action on the bond to the Bank (R. 1091 & 1119-1121). The assignment contained the following:

> "Whereas, the undersigned is indebted to the Union Planters National Bank & Trust Company in the amount of Two Hundred and Eighty Thousand ($280,000.00) Dollars by way of a loan the proceeds of which have been or will be used in the construction and completion of said plant;
>
> Now, Therefore, in order to further secure said Union Planters National Bank & Trust Company, the undersigned hereby absolutely assigns unto Union Planters National Bank & Trust Company, its successors and assigns, any and all claims, actions or causes of action which it may now or hereafter have against the New Amsterdam Casualty Company under the terms and provisions of said performance and payment bond together with any and all moneys which the undersigned may at any time

receive from or for the account of the said New Amsterdam Casualty Company in payment or satisfaction of its obligation under said bond as well as all rights which the undersigned may now or hereafter have to receive from or for the account of said New Amsterdam Casualty Company any moneys in payment or satisfaction of its obligation under said bond; and the said Union Planters National Bank & Trust Company, its successors and assigns, shall have full and complete right to institute and prosecute in its name or in the name of the undersigned any suit or action at law or in equity against the New Amsterdam Casualty Company to enforce performance and payment by it of its obligations under said bond; * * *" (R. 1120-1121).

The assignment further provided that the Bank would not bring suit on the bond prior to default on the part of respondent in the payment of its indebtedness to the Bank, and attempted to reserve to itself the right to sue, and provided that upon payment of $30,000.00 of its indebtedness to the Bank, the Bank should release the assignment. It also contained the following provision:

"* * * and it is further understood that until such time as the undersigned may have defaulted in the payment of its debt to Union Planters National Bank & Trust Company no notice of this assignment will be given the New Amsterdam Casualty Company." (R. 1121).

The Surety promptly filed an amendment to its answer, and alleged that the assignment had been made, and attached a copy and pleaded the assignment as a bar to recovery. It expressly pleaded and relied upon the following condition precedent in the bond:

"Provided, however, that this Bond is executed and accepted upon the following express conditions,

each of which shall be a **condition precedent** to any right of recovery hereon, anything in the contract to the contrary notwithstanding:

Sixth. That no right of action shall accrue upon or by reason hereof, to or for the use or benefit of anyone other than the Obligee herein named; and that the obligation of the Surety is, and shall be construed strictly as, **one of suretyship only**; that this Bond shall be executed by the Principal before delivery, and that it shall not, **nor shall any interest or right of action thereon, be assigned without the prior written consent of the Surety,** * * *" (R. 19 & 21).

Respondent replied to the amendment to the answer and admitted the assignment; but it attempted to avoid its effect by averring that the assignment was by way of pledge; that its claim against petitioner was assignable under the laws of the State of Arkansas, and that the provision against assignment contained in the bond was against public policy and void. **(R. 56).**

The Surety moved for a summary judgment based upon the assignment in violation of the condition precedent in the bond (R. 59). The District Judge took the motion under advisement, but did not act upon it. After the case had been tried before the jury and at the conclusion of all of the evidence, the Surety moved for a directed verdict. The District Judge overruled that motion, and gave his reason as follows:

"The Court: On the question of the assignment clause, the Court is going to hold that the assignment does not render this contract invalid. The Court is of the opinion that to hold to the contrary would be against public policy." (R. 891).

This defense was urged in the Circuit Court of Appeals (Petitioners' brief in that Court, 8, 9, 19, 33-40). Petitioners also insisted in the Circuit Court of Appeals that if the District Court was correct in holding that the provision prohibiting assignment was void the inevitable result was that any claim or cause of action against petitioners was vested in the Bank, and that the respondent had no right to maintain the action.

Petitioners do not understand the reasoning of the Circuit Court of Appeals and are unable to state it. It is deemed better to quote all that portion of the opinion dealing with this question.

> "The contentions of the defendants are directed largely to the ruling of the court in denying the motion of New Amsterdam Casualty Company for a directed verdict. This motion is brief and reads as follows:
>
> 'We move for a directed verdict in favor of the New Amsterdam Casualty Company upon the ground that the plaintiff made an assignment of the bond and of its claim on the bond in violation of the terms of the bond, and upon the ground that the plaintiff failed to give the surety notices, as required by the bond of the alleged defaults upon which this suit is predicated.'
>
> It seems to have been the contention of defendants in the trial court, and they renew the contention here, that the assignment of this bond as a pledge or collateral security, had the effect of invalidating it. In overruling the motion for a directed verdict, the court, among other things, said:
>
> 'On the question of the assignment clause the court is going to hold that the assignment does not render this contract invalid.'

It is observed that there is no suggestion in this motion that the assignment was effective, and hence, the plaintiff was not the real party in interest. Nor does the original brief of defendants in this court contain any such suggestion. But it is contended that this assignment violated the terms of the bond, and hence, the bond was invalid. The provision which we have before set out must be considered as a whole. It provides that no right of action shall accrue for the use or benefit of any other than the obligee therein, and that no interest or right of action thereon may be assigned without the written consent of the surety. The assignee is not attempting to maintain this action, and hence, we are not called upon to determine what right, if any, it acquired by reason of this assignment. Certainly, if the assignment conveyed no interest or cause of action to the assignee that right continued in the obligee of the bond, the plaintiff in this action. There is nothing in the provision indicating that it was intended to affect the rights of the obligee, and the assignee is not here asserting any rights under the alleged assignment. The only assignment relied upon was one which pledged this bond as surety for the payment of money. This was in the nature of a mortgage. (Citing cases)." (R. 1139-1140).

B.

QUESTIONS PRESENTED

The questions presented are:

1. Whether the effect of the holding of the Circuit Court of Appeals is to deprive the Surety of its right to contract and to stand upon its contract as written.

2. Whether a court has the authority and power to refuse to enforce the plain and unambiguous terms of the

contract which are not prohibited by the constitution, by statutes, or by public policy, and do not result from any accident, fraud or mistake.

3. Whether the District Court and the Circuit Court of Appeals had the power and authority to impose a $150,000.00 liability in the face of respondent's agreement that it would have no right of recovery upon the bond if it made an assignment of its claim on the bond, and respondent's admission that it assigned its claim prior to the institution of the suit, and that the breach of the condition precedent existed at the time the suit was filed.

4. Whether the Circuit Court of Appeals should have sustained the Surety's motion for a directed verdict predicated upon the violation of the condition precedent in the bond, by the execution of the assignment.

C.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court Appeals has so far departed from accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. The Circuit Court of Appeals has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. In refusing to enforce the provisions of the bond as written, the Circuit Court of Appeals clearly departed from the accepted and usual course of judicial proceedings and sanctioned the action of the District Court in so doing.

4. The effect of the holding of the Circuit Court of Appeals that respondent could recover despite the admitted assignment, and despite respondent's agreement that it would have no right of recovery if it made the assignment, is the decision of an important question of general law in a way untenable and probably in conflict with the weight of authority and the decisions of this Court.

5. If, for any reason, the condition of the bond be void or inapplicable, the District Court did not have jurisdiction because the assignee Bank was, in that event, the real party in interest, and therefore an indispensable party.

The questions presented are important because they strike at the heart of every person's right to contract and to be protected by the provisions of the contract. They are of unusual importance to the public, because (a) a Circuit Court of Appeals has held (in this case) that it is not bound to enforce a contract which has no infirmity, —it is believed that that is the effect of the decision— (b) it has failed to follow the decisions of this Honorable Court, and (c) if, for any reason the condition precedent against assignment is void, then the Circuit Court of Appeals has permitted a Federal District Court to award a judgment when the latter court was without jurisdiction because of the absence of an indispensable party,—the assignee being the real party in interest.

PRAYER FOR WRIT.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this Court for its review on a day certain to be therein named a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket "No. 13607, New Amsterdam Casualty Company, a corporation, Appellant, v. Craighead Rice Milling Company, a corporation, Appellee" and "No. 13608, J. M. Jack and L. M. Jack, a co-partnership doing business as Jack Construction Company, Appellants, v. Craighead Rice Milling Company, a corporation, Appellee"; and that said judgment of said United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

LOWELL W. TAYLOR,
Counsel for Petitioners.

ARTHUR L. ADAMS,
Of Counsel for Petitioners.

Certificate of Counsel.

I, Lowell W. Taylor, one of the counsel for the above named petitioners, do hereby certify that the foregoing petition for writ of certiorari is presented in good faith and not for delay.

LOWELL W. TAYLOR,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT—

JURISDICTION.

Petitioner, New Amsterdam Casualty Company, is a corporation incorporated under the laws of the State of New York. Petitioners, J. M. Jack and L. M. Jack are citizens and residents of Kansas City, Kansas. Respondent, Craighead Rice Milling Company, is a corporation incorporated under the laws of Arkansas. The District Court in Arkansas took jurisdiction solely on the diversity of citizenship alleged. A judgment for more than $3,000.00 exclusive of interest and costs was demanded on the bond sued on. The right of review on certiorari is invoked under Section 347, Title 28 U.S.C.A., and because of a conflict between the decision of the Circuit Court of Appeals in this case and decisions of this Court, and because that court exceeded its power and authority in failing to enforce the contract.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court in each of the cases.

2. In holding that the respondent's suit was not barred by reason of the breach of the condition precedent in the bond prohibiting assignment of any interest in the bond or any claim under it.

3. In failing to hold that the District Court was without jurisdiction by reason of the absence of an indispensable party if it was right in holding the provision in the bond invalid or inapplicable.

4. If this petition is granted petitioners will desire to raise two other questions, viz. (1) there is a minimum of $58,960.00 (R. 325-326) and a maximum of $90,545.78 (R. 539-540) included in the judgment for waterproofing above grade, not required by the contract, plans or specifications. There is a minimum of $35,000.00 and an indefinite maximum included as a penalty for damages for delay, despite the undisputed evidence that no actual damage resulted from delay in completion. It is not deemed proper to burden the Court with these questions unless and until the writ is granted.

ARGUMENT.

The Violation Of The Condition Precedent Barred A Recovery.

It is petitioners' contention that the Circuit Court of Appeals exceeded its authority and its jurisdiction when it refused to enforce the condition precedent in the bond, by the terms of which respondent agreed that it would have no right of recovery if it made an assignment of the bond or of its claim on it. The Supreme Court of Arkansas and this Honorable Court have repeatedly held that the courts must enforce an unambiguous contract as it is written in the absence of a constitutional or statutory prohibition if the contract is not against public policy or the result of accident, fraud or mistake.

In **Edwards v. Anderson** (1923), 161 Ark. 665, 252 S. W. 908, at page 913, the Supreme Court of Arkansas said:

"But the court cannot make contracts for the parties and must enforce them as they are written. The contract under review is a very harsh one, judged by the financial hardships which have overwhelmed the appellant, because of his failure or inability to comply with its terms; but it is not claimed by the appellant that any fraud was perpetrated upon him by the appellee by which he was induced to enter into the contract. As was said by Judge Riddick, speaking for this court in Carpenter v. Thornburn, 76 Ark. 578-582, 89 S.W. 1047, 1049:

'The contract may be a harsh one, but it contravenes no rule of public policy. The parties made it, and the courts cannot alter it.'

In that case we quoted the following from Prof. Pomeroy:

'It is well settled that when the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity cannot relieve a vendee who has made default. * * * It is also equally certain that, when the contract is made to depend upon a condition precedent—in other words, when no right shall vest until certain acts have been done, as, for example, until the vendee has paid certain sums at certain specified times—then also a court of equity will not relieve the vendee against the forfeiture incurred by a breach of such condition precedent.' 1 Pomeroy, Equity, 445.

Now the parties to this contract expressly make time the essence thereof and provide for a forfeiture in case of a failure upon the part of appellant to comply with the terms of the contract as to payment, or to comply with the conditions therein provided.

(2) 2. Such is the law."

The opinion is not reported in the Arkansas reports, and we have therefore quoted from the Southwestern Reporter.

In **Clouston v. Maingault** (1912), 105 Ark. 213, 150 S.W. 858, the Court said:

> "* * * and the Court can neither eliminate nor supply nor rearrange the words and sentences in the unambiguous contract, but must construe it as the parties have made it." 105 Ark. at page 217.

In **Twin City Pipe Line Co. v. Harding Glass Co.** (1931), 283 U.S. 353, 51 S. Ct. 476, 75 L. Ed. 1112 this Honorable Court said:

> "The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made **shall** be held valid **and enforced** by the courts." 283 U.S. at page 356.

As early as 1841 the Supreme Court of Arkansas went so far as to hold that where the right of action depends upon the performance of a condition precedent, by the plaintiff, and the declaration omits to allege performance, the omission is incurable, by verdict. **Childress v. Foster**, 3 Ark. 252, at page 259.

In **Bankers Surety Company, et al. v. Watt** (1915), 118 Ark. 492, 177 S.W. 20, the Supreme Court of Arkansas denied a recovery to the obligee in a performance bond because the obligee failed to comply with a condition precedent.

In **Imperial Fire Insurance Company v. Coos County** (1894), 151 U.S. 452, 14 S. Ct. 379, 38 L. Ed. 231, this Honorable Court said:

> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guarantee the insured against loss or damage, upon the terms and conditions agreed upon, **and upon no other**, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms." 151 U.S. 452, at page 462.

Nothing can be found in the Federal Constitution or in the Arkansas Constitution or in the Federal Statutes or in the Arkansas Statutes prohibiting the surety from requiring the obligee to agree that it would not assign the bond or its claim on it. No claim is made that respondent made that agreement as a result of any fraud, accident or mistake. The provision does not contravene any public policy.

The decision of the Circuit Court of Appeals holding that the provision in the bond is contrary to public policy is in conflict with numerous decisions of this Court, including the following:

Steele v. Drummond (1927), 275 U. S. 199, 48 S. Ct. 53, 72 L. Ed. 238, wherein it was held that even an agreement to procure the passage of city ordinances for the benefit of the contracting parties was not contrary to public policy.

Twin City Pipe Line Co. v. Harding Glass Co. (1931), 283 U. S. 353, 51 S. Ct. 476, 75 L. Ed. 1112, holding that a contract by which one party agrees to take all of its supply of gas does not contravene the public policy of Arkansas prohibiting perpetuities and monopolies. In so holding the Court said:

> "The glass company has failed to show that the contract has any tendency to injure the public, and no reason appears why it should not be enforced according to its terms." 283 U. S. at page 358.

Advance-Rumley Thrasher Co. v. Jackson (1932), 287 U. S. 283, 53 S. Ct. 133, 77 L. Ed. 306, wherein it was said that a legislative act declaring a contract to be contrary to public policy can only be justified by the existence of exceptional circumstances.

Muschany v. The U. S. (1945), 324 U. S. 49, 65 S. Ct. 442, 89 L. Ed. 744, holding that the United States could not escape responsibility on contracts entered into by it upon the ground that they were contrary to public policy, saying:

> "No other case has come to our attention which has declared that a commission or purchase contract is invalid on the ground of public policy. Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. Vidal v. Philadelphia, 2 How (US) 127, 197, 198, 11 L ed 205, 233, 234. As the term 'public policy' is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy." 324 U.S. at page 66.

Petitioners contend that the writ should be granted because of the conflict between the decision of the Eighth Circuit Court of Appeals and the foregoing decisions of this Court. **St. Paul F. & M. Ins. Co. v. Bachmann** (1932), 285 U.S. 112 at page 115, 52 S. Ct. 270, 76 L. Ed. 648 at page 652.

The Arkansas Statutes, **Pope's Digest, Section 512,** and **Chapter 118 Acts of Arkansas 1945,** making the in-

struments designated therein assignable are simply enabling statutes making certain instruments assignable which were not assignable at common law. No Arkansas statute prohibits the parties to a contract from agreeing that no right of action will accrue thereon if it be assigned.

Respondent relied on three Arkansas cases holding that the provision against assignment does not apply to any assignment made after the loss has accrued.

In **McBride v. Aetna Life Insurance Co.** (1917), 126 Ark. 528, 191 S.W. 5, relied on by respondent, the claim on the policy was not assigned until after it had been liquidated and had become a judgment debt.

In **Garetson-Greason Lumber Co. v. Home Life & Accident Co.** (1917), 131 Ark. 525, 199 S.W. 547, the claim on the policy was not assigned until after the insured had obtained a judgment on its claim and that judgment had been affirmed on appeal.

In **National Mutual Casualty Co. v. Cypret** (1944), 207 Ark. 11, 179 S.W. (2d) 161, the policy did not prohibit assignment.

Respondent also contended in the Circuit Court of Appeals that the prohibition against assignment does not apply to an assignment as collateral security. No Arkansas case was cited. Respondent said it found none.

Petitioners do not know whether the Circuit Court of Appeals intended to hold that the provision does not apply to an assignment as collateral security. If it did the decision is in conflict with the holding of this Honorable

Court in **Portugese-American Bank v. Welles** (1916), 242 U.S. 7, 37 S. Ct. 3, 61 L. Ed. 116. In that case Welles sought to impress a lien on a debt due by the City of San Francisco to a contractor then in bankruptcy. The contractor had made an assignment of the debt, **as collateral security for a loan**, but not until it had been approved for payment by the city auditor. The contest was between Welles, a sub-contractor, asserting a statutory lien, and the Bank, holding a prior assignment. Welles conceded his lien to be subordinate if the assignment was valid. He relied on a provision in the contract, between the City and the contractor, which prohibited an assignment of any money due under the contract. This Court recognized the right of the City to rely on the provision against assignment, saying:

> "There is a logical difficulty in putting another man into the relation of the covenantee to the covenantor, because the facts that give rise to the obligation are true only of the convenantee,—a difficulty that has been met by the fiction of identity of person and in other ways not material here. Of course, a covenantor is not to be held beyond his undertaking, and **he** may make that as narrow as he likes. Arkansas Valley Smelting Co. v. Belden Min. Co., 127 U.S. 379, 32 L. ed. 246, 8 Sup. Ct. Rep. 1308." 242 U.S. at page 11.

The Court's only concern was with the right of a stranger to rely upon it. The opinion emphasizes the fact that the City did not object to the assignment, but stood indifferent, willing that the common law should take its course. The Court recognized the rule that the provision against assignment was inserted for the benefit of the City, but said the reason was not important on the facts before the Court.

Assignment of claims against the Government is prohibited by Act of Congress. U.S.C.A. Title 41, Section 15. The reason for such prohibition has been stated by this Court in **Hobbs v. McLean** (1886), 117 U.S. 567, 6 S. Ct. 870, 29 L. Ed. 940, as follows:

> "* * * The sections under consideration were passed for the protection of the Government. Goodman v. Niblack, 102 U.S. 556. They were passed in order that the Government might not be harrassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed **and a settlement made.** * * *" 117 U.S. 567, at page 576.

This should be a complete answer to the holding that the prohibition is contrary to public policy. In the case at bar the principal and surety desired to protect themselves from claims or suits against one or more assignees, and they desired that in the event the contractor could not complete, because of reason beyond his control or otherwise, the owner would retain his desire to have a completed structure and minimize his damages by completion. By the provision the Surety protected itself from just such a situation as this. It did not want an owner to accept a structure which it admitted under oath was worth more than $350,000.00 (R. 1110), borrow all it could on its claim on the bond, lose interest in completion, and sue for the full penalty of the bond, and insist upon a penalty of $100 per day for the time it would take somebody to complete. In this case the respondent's President testified that if he had not had the bond he would have completed the building (R. 112).

Any contention that the provision does not apply to an assignment as collateral security seems also to be

answered by the wording of the bond. That provision is not limited or restricted, but reads,—

> "* * * nor shall **any** interest therein, or right of action thereon, be assigned * * *" (R. 21).

The case of **Sheridan v. Pacific State Fire Insurance Co.** (1923), 107 Ore. 285, 212 Pac. 783, cited in the opinion of the Circuit Court of Appeals recognized the validity of a provision against assignment, but held that the instrument before it for consideration was not an assignment but might be construed to give the person holding the instrument some kind of lien on the proceeds. The Court said:

> "* * * It will be seen that by its terms it does not attempt to assign the policy, and no actual assignment is shown." 212 Pac. 783, at page 784.

No other case cited by the Circuit Court of Appeals dealt with a contractual provision against assignment.

It can be safely asserted that no decision can be found holding that where the parties agree that the bond is one of suretyship only and that no assignment shall be made, such a provision does not apply to the assignment of a claim for unliquidated damages or that it does not apply to an assignment as collateral security. The surety is as much exposed to a suit by a bank holding the assignment as collateral security as it is where the bank has an assignment for any and all purposes.

The fallacy in the opinion of the appellate court lies in treating the prohibition against assignment as ineffective and therefore cannot be relied upon to defeat the claim. But the question is not whether the assign-

ment was prohibited, but whether as a condition precedent the Surety had the right to make its liability depend upon the non-assignment,—whether for a collateral purpose or otherwise. The language is, "* * * nor shall any **interest** (in the bond) be assigned without consent of the Surety." The condition was in the nature of a promissory warranty, and being violated invalidated the contract of suretyship under its terms.

If Provision With Respect to Assignment Be Invalid or Inapplicable, the District Court Had No Jurisdiction.

If petitioners are wrong with respect to all of the foregoing it immediately appears, and the inevitable result is, that the Court did not have jurisdiction. If the provision against assignment is void for any reason, then the assignment is, under Arkansas law, valid. The assignment divested respondent of all its claim on the bond and vested it in the Bank. The Bank immediately became the real party in interest, and was required by Rule 17(a) Federal Rules of Civil Procedure, and Pope's Arkansas Digest, Section 1305, to bring suit in its own name. See:

Arkansas Valley Smelting Co. v. Belden Min. Co. (1888), 127 U.S. 379, 8 S. Ct. 1308, 32 L. Ed. 246, holding that if the assignment had been valid the assignee would be the real party in interest and sustaining defense that the contract could not be assigned;

Falvey v. Foreman-State National Bank (1939), CCA 7, 101 F. (2d) 409, holding that under Federal Equity Rule 37 (now Rule 17(a) Federal Rules of Civil Procedure) the assignee is the real party in interest and dismissing suit by the assignor;

Where the assignment is for collateral security the assignee is the real party in interest,—**2 Moore Federal Practice** (1938), page 2053;

In **Love v. Cahn** (1909), 93 Ark. 215, 124 S.W. 259, it was held that an equitable assignee of a claim on a supersedeas bond (containing no prohibition against assignment) was the real party in interest within the meaning of the Arkansas Statute.

The Bank was an indispensable party. Its absence as a party plaintiff deprived the Court of jurisdiction.

Strawbridge v. Curtis (1857), 7 U.S. 267, 3 Cranch 267, 2 L. Ed. 435;
Coirin v. Millaudin (1857), 60 U.S. 113, 19 How. 113, 15 L. Ed. 575;
Smith v. Lyon (1890), 113 U.S. 315, 10 S. Cit. 303, 33 L. Ed. 635;
Niles-Bement-Pond Co. v. Iron Moulders Union (1920), 254 U.S. 77, 41 S. Ct. 39, 65 L. Ed. 145;
U.S. v. Hellard (1944), 322 U.S. 363, 64 S. Ct. 985, 88 L. Ed. 1326;
Mine Safety Appliances v. Forrestal (1945), 326 U.S. 371, 66 S. Ct. 219, 90 L. Ed. 140.

That the respondent intended to assign all its claim on the bond and was therefore an indispensable party is certain. Cotemporaneously with the execution of the assignment the attorney for and Secretary-Treasurer of respondent company executed an affidavit in support of the application for the additional loan containing the following:

"At any rate we consider the buildings and real estate, spur stracks, pumps and appliances to be worth at present more than $350.000.00, and with anticipated additional expenditures and work the cost and value will exceed $375,000.00 or $380,-000.00." (R. 1110).

Shortly prior to the assignment respondent wrote the Bank that the building was near to completion, but that it would take $2,000.00 or $3,000.00 additional to complete the building (R. 1121-1122). At the time the assignment was made respondent certainly did not contemplate recovering anything like $30,000.00 for the cost of completion. Even if respondent and the Bank both had the right to sue, still the Bank was an indispensable party.

If for any reason the prohibition against assignment in the bond is void, then petitioners have been exposed to a lawsuit by the Bank ever since the assignment was made, and, insofar as this record shows, are still exposed to such a suit. Even giving effect to the attempt to postpone the right of the Bank to sue until default in the payment of respondent's indebtedness to the Bank, all that respondent has to do to expose petitioners to such a suit is to make default either voluntarily or involuntarily.

With respect to this the Circuit Court of Appeals said:

> "* * * The assignee is not attempting to maintain this action, and hence, we are not called upon to determine what right, if any, it acquired by reason of this assignment." (R. 1140).

It would seem that if that court held the provision against assignment invalid or inapplicable it became immediately called upon to determine whether the assignee bank was an indispensable party and whether the Court had jurisdiction.

WHEREFORE, petitioners pray that the writ be issued.

LOWELL W. TAYLOR,

ARTHUR L. ADAMS,
Of Counsel.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

NEW AMSTERDAM CASUALTY COMPANY, a Corporation,

Petitioner,

vs.

CRAIGHEAD RICE MILLING COMPANY, a Corporation,

Respondent.

No. 778

J. M. JACK and L. M. JACK, a Co-Partnership, Doing Business as JACK CONSTRUCTION COMPANY,

Petitioners,

vs.

CRAIGHEAD RICE MILLING COMPANY, a Corporation,

Respondent.

No. 778

REBUTTAL MEMORANDUM.

LOWELL W. TAYLOR,
Commerce Title Building,
Memphis, Tennessee,
Counsel for Petitioners.

ARTHUR L. ADAMS,
Jonesboro, Arkansas,
of Counsel.

TOOP

IN THE

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Respondent.

No. 778

REBUTTAL MEMORANDUM.

Throughout the trial in the district court petitioners and respondent treated the abortive effort to avoid the breach of the condition precedent in the bond by a mere allegation that $30,000.00 had been paid off and the as-

signment cancelled as unimportant. No effort was made to prove it. Respondent did file a nebulous petition saying that it had paid off $30,000.00, after the assignment had been discovered and pleaded as a defense, but it found itself confronted with the following proposition of law:

> "Plaintiff's right to any recovery depended upon its right at the inception of the suit, and the non-existence of a cause of action when the suit was started is a fatal defect, which cannot be cured by the accrual of a cause pending suit. (Citing cases, including U. S. Supreme Court cases.)" **American Bond Co. v. Gibson County,** 1906, CCA 6, 145 Fed. Rep. 871, at page 874.

The suit was filed July 12, 1946 (R. 1), at which time the assignment was in full force and effect.

If no right of action existed in respondent on the date suit was brought the court was without jurisdiction.

As evidence of the fact that respondent realized it had accomplished nothing by paying the bank $30,000.00, we respectfully direct attention to the designation of the record (R. 66-67, 70, 78-79) in which it after due deliberation omitted the matter now attempted to be brought before the Court, and the stipulation (R. 68) signed by counsel for respondent that the record as sent to the Circuit Court of Appeals contained everything necessary to the questions to be presented on appeal. Points upon which petitioners rely were filed in the district court in which the violation of the condition precedent against assignment was attacked (R. 71-73).

No suggestion for diminution of the record was made in the Circuit Court of Appeals.

It is contended that respondent is wrong in saying that the assignment was only to secure $30,000.00. The assignment was given to secure $280,000.00, with the privilege on the part of respondent to pay $30,000.00 and get it cancelled. Respondent could easily default in the payment of $30,000.00 and leave the bank holding an assignment with a face value of $280,000.00 against petitioners for the full penalty of the bond.

Respondent seems to have completely overlooked the fact that questions of jurisdiction (other than jurisdiction of the person) can be raised at any time. **Coirin v. Millaudin** (1857), 60 U.S. 113, 19 How. 113, 15 L. Ed. 575. Probably one hundred more cases could be cited to the same effect.

THE CONDITION PRECEDENT.

Referring again to the language of this court in the **Imperial Fire Insurance Company case,** 151 U.S. 452, we repeat what this court said respecting contracts of insurance or contracts of indemnity, to-wit:

> "For a comparitively small consideration the insurer undertakes to guarantee the insured against loss or damage **upon the terms and conditions agreed upon,** and upon no other, and when called upon to pay in case of loss the insurer therefor may justly insist upon the fulfillment of these terms." 151 U.S. p. 462.

The question presented under the provision in the contract of suretyship is for the liability attached under the provision of the contract to the effect that "nor shall any **interest** (in the bond) be assigned without the consent of the Surety."

We may concede that the contract was assignable. We may further concede that the right of action under the contract was assignable. But the condition just quoted is that if the bond or contract of suretyship is assigned or if any **interest** is assigned without the consent of the surety, "no right of action to the obligee shall accrue upon the bond."

The condition in the present bond is not the equivalent of that to be found in the ordinary fire insurance policy. It is somewhat analogous but different in this,—that the condition in the present bond prescribes no liability in the event that any interest in the bond is assigned. An interest in the bond was assigned and we are not without legal authority to the effect that where such language is used it creates a violation of the condition. **Cooley's on Insurance,** Vol. 6, p. 2901.

In the instant case the Surety had the right to make its liability dependent upon the non-assignment, regardless of whether for collateral purpose or otherwise.

Is not the decision of the appellate court in refusing to enforce the condition quoted in direct conflict with the decision of this Court in the **Imperial Fire Insurance Company** case referred to above?

Again we call the Court's attention to the langauge of the bond, that is to say, that it was executed and **"accepted** upon the following express conditions, each of which shall be a condition precedent to any right of recovery hereon. * * *."

Here was an express agreement mutual whereby the party suing upon the bond **"accepted"** the particular

provision and all other provisions of the bond; and violated that provision by the assignment heretofore mentioned. The contract is not in any sense unilateral, but binding upon both parties with respect to the conditions and provisions therein contained, the Surety offering the bond upon a named condition and the Obligee accepting it upon those conditions.

Is not the decision of the appellate court a refusal to enforce the contract according to its terms?

Petitioners see no reason for debating jurisdictional grounds with respondent. The decision of the Circuit Court of Appeals is in conflict with the decision of this Court in **Imperial Fire Ins. Co. v. Coos County** (1894), 151 U.S. 452, 14 S. Ct. 379, 38 L. Ed. 231. And in holding that the provision in the contract is against public policy it is in conflict with all of the cases cited in the brief in support of the petition for certiorari. Respondent seems to overlook the fact that this Court will review a decision of the Circuit Court of Appeals where the decision of that Court is in direct conflict with an established line of decisions of this Court. **St. Paul F. & M. Ins. Co. v. Bachman** (1932), 285 U.S. 112, 52 S. Ct. 270, 76 L. Ed. 648.

We quote the following erroneous statement from the response:

> "Replying to a suggestion similar to that now made, and first contained in Petitioner's reply brief in the Circuit Court of Appeals, Respondent was permitted to file with the Circuit Court of Appeals a certified copy of the release by the Bank. There is, therefore, a persistent effort by Petitioners to make the Appellate Courts think the Bank had some interest

in the assignment at the time of trial, when Petitioners know this is not a fact." (Response p. 4).

Respondent does not cite the record, and it cannot cite the record.

Respectfully submitted,

LOWELL W. TAYLOR,
Counsel for Petitioners.

ARTHUR L. ADAMS,
Of Counsel.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

NEW AMSTERDAM CASUALTY COMPANY, a Corporation,
Petitioner,
vs.
CRAIGHEAD RICE MILLING COMPANY, a Corporation,
Respondent.

No. 778...

J. M. JACK and L. M. JACK, a Co-Partnership, Doing Business as JACK CONSTRUCTION COMPANY,
Petitioners,
vs.
CRAIGHEAD RICE MILLING COMPANY, a Corporation,
Respondent.

No. .....

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

CHARLES FRIERSON,
JOE C. BARRETT,
ARCHER WHEATLEY,
Jonesboro, Arkansas,
Counsel for Respondent.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

LIST OF AUTHORITIES CITED.

Cases.

Textbooks.

IN THE

SUPREME COURT OF THE UNITED STATES.

NEW AMSTERDAM CASUALTY COMPANY, a Corporation,
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No. .....

J. M. JACK and L. M. JACK, a Co-Partnership, Doing Business as JACK CONSTRUCTION COMPANY,
Petitioners,
vs.
CRAIGHEAD RICE MILLING COMPANY, a Corporation,
Respondent.
No. .....

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

The respondent respectfully shows to this Honorable Court that the record herein does not present facts sufficient to justify this Court in granting the Writ and respectfully prays that the petition be denied.

For reasons therefor, respondent states:

I.

This suit involves a controversy between the owner, the contractor and contractor's bondsman growing out of the breach of a building contract and affecting the rights of three private litigants. The public interest as distinct from the interest of private litigants is not involved.

II.

This suit involves no federal constitutional or statutory question.

III.

The decision of the Circuit Court of Appeals presents no conflict either with decisions of this court, or decisions of other circuits, or decisions of the Supreme Court of Arkansas.

IV.

Point 5 relied on by petitioners does not present a question of indispensable parties under the rules of civil procedure or under the old Equity Rules. Furthermore, this question was raised for the first time in petitioner's reply brief in the Circuit Court of Appeals and was not an issue before the trial court.

CRAIGHEAD RICE MILLING COMPANY,

By: CHARLES FRIERSON,
JOE C. BARRETT,
ARCHER WHEATLEY,
Counsel for Respondent.

I.

STATEMENT.

A statement of the case by Respondent is necessary.

Respondent entered into a contract with Petitioner Jack Construction Company for erection of a rice drier and storage bins (R. 16). New Amsterdam Casualty Company was surety on the performance bond. When the contractor had erected the general structure of the plant, the Owner (Respondent) thought the work complied with the plans and specifications. The Surety repeatedly requested Respondent to release part, then all, of the retained percentage called for by the construction contract (R. 117-118, 366, 701) and then requested payment of additional sums over the full contract price to the contractor's creditors (R. 147, 365-366). After long negotiations the Surety, on March 27, 1946, refused to complete the structure and Respondent was forced to pay out $13,887.53 more than the contract price (R. 142) to creditors of the Contractor who had potential liens against the building. To protect the structure against foreclosure of the first mortgage of $250,000, and then mistakenly believing a small amount of additional expense would complete the building (R. 373, 379, 588) (in line with repeated assurances of the contractor) (R. 98-100, 222) Respondent borrowed an additional $30,000 from Union Planters National Bank & Trust Company, of Memphis, Tennessee, on April 26, 1946, giving as collateral security a pledge of any payment received from the surety on the contractor's bond. The Bank agreed to release the assignment when $30,000 was paid to it (R. 1121). On November 25, 1946, when the assignment was first pleaded by Petitioner Surety, approximately $18,000 had been repaid (R. 57) and the entire $30,000 was paid and the assignment was released and discharged approximately three months be-

fore the trial lasting two weeks in the District Court. On December 16, 1946, Respondent filed in the District Court the release of the Bank, and the latter thereafter had no interest whatever of any kind in the assignment.

At no time did Petitioner ever raise in the District Court the question of the Bank being a party to the suit.

The Bank had no interest at the time of trial, and the present contention along that line is made with the knowledge of Petitioner that:

(1) The assignment was as collateral security only, containing a covenant to release as soon as the $30,000 was repaid;

(2) The Bank filed a receipt for the payment of the $30,000 and a discharge of the assignment nearly three months before the trial;

(3) No response or further pleading of any kind with reference to the release by the Bank was filed by Petitioners in the District Court;

(4) The Bank having no interest, and there being no dispute about the matter in the District Court, the record on appeal (containing 1152 pages) in compliance with Rule 75e, necessarily omitted pleadings and orders about questions not covered by the assignment of error or points relied on for the appeal.

Replying to a suggestion similar to that now made, and first contained in Petitioner's reply brief in the Circuit Court of Appeals, Respondent was permitted to file with the Circuit Court of Appeals a certified copy of the release by the Bank. There is, therefore, a persistent effort by Petitioners to make th. Appellate Courts think the Bank had some interest in the assignment at the time of trial, when Petitioners know this is not a fact.

Respondent therefore submits herewith authenticated copies of said pleading, showing the release and showing the filing date of December 16, 1946, for filing and to be a part of the record, and respectfully prays that this statement and brief be treated as a motion or petition for amendment or completion of the record to include said pleading filed in the District Court, which is as follows:

12-16-46 copy to A. L. Adams Atty

Grady Miller, Clerk, by Bess Mathes, D. C.

Filed Dec. 16, 1946
Grady Miller, Clerk
By Bess Mathes, D. C.

In the District Court of the United States,
Jonesboro Division, of the Eastern
District of Arkansas.

Craighead Rice Milling Company, Plaintiff,
vs.
New Amsterdam Casualty Company, et al., Defendants.
No. J-444.

Notice and Amendment by Plaintiff With Release of Assignment to Bank.

To Lowell Taylor and Arthur Adams, Attorneys for Defendants:

You are notified that plaintiff will ask leave to file on December 16, 1946, the Amendment to its Answer, Copy of which is hereto attached. Plaintiff asks leave of Court to file the following Amendment to its Answer, to-wit:

Plaintiff says that the assignment as collateral security executed to Union Planters National Bank and Trust Company, of Memphis, Tennessee, has been released and the formal release of said assignment dated December 14, 1946, is hereto attached as an exhibit and asked to be made a part hereof.

Wherefore, plaintiff prays as in other pleadings and for all other proper relief.

Chas. D. Frierson,
Frierson & Frierson,
Attorneys for Plaintiff.

Verification.

Chas. D. Frierson, being sworn, doth solemnly swear that the statements in the foregoing Amendment are true.

This December 16, 1946.

Chas. D. Frierson.

Subscribed and sworn to before me on this December 16, 1946.

My com. exp. Feb. 5, 1949.

Clara Browder,
(Seal) Notary Public.

Filed Dec. 16, 1946,
Grady Miller, Clerk,
By Bess Mathes, D. C.

Release of Assignment.

Whereas, Craighead Rice Milling Company of Jonesboro, Arkansas, heretofore on April 25, 1946, by instrument in writing duly assigned unto Union Planters National Bank & Trust Company, its successors and

assigns, any and all claims, actions or causes of action which it might then or thereafter have against New Amsterdam Casualty Company under the terms and provisions of a certain performance and payment bond, executed by New Amsterdam Casualty Company as surety for J. M. Jack Construction Company in connection with its contract to construct a rice drying and storage plant and mill at Jonesboro, Arkansas, for Craighead Rice Milling Company, together with any and all moneys which said Craighead Rice Milling Company might at any time receive from or for the account of New Amsterdam Casualty Company in payment or satisfaction of its obligations under said bond as well as all rights which Craighead Rice Milling Company might then or thereafter have to receive from or for the account of New Amsterdam Casualty Company any moneys in payment or satisfaction of its obligation under said bond; and

Whereas said assignment was executed as collateral security for the payment by Craighead Rice Milling Company of an indebtedness to Union Planters National Bank & Trust Company in the amount of $280,000.00 and contained a provision that when Union Planters National Bank & Trust Company should have received from said Craighead Rice Milling Company or anyone acting in its behalf, or from New Amsterdam Casualty Company the sum of $30,000.00, said Union Planters National Bank & Trust Company would thereupon release said assignment; and

Whereas, on December 3, 1946, Union Planters National Bank & Trust Company received from Craighead Rice Milling Company the sum of $30,000.00 for application upon said indebtedness and said sum was credited thereon;

Now, Therefore, said Union Planters National Bank & Trust Company does hereby fully release and discharge said assignment of April 25, 1946, this 14th day of December, 1946.

Union Planters National Bank & Trust Company,
By R. J. McElroy,
Vice-President.

In the District Court of the United States
for the Jonesboro Division of the
Eastern District of Arkansas.

I, Grady, Miller, Clerk of the District Court of the United States for the Eastern District of Arkansas, in the Jonesboro Division thereof, do hereby certify that the annexed and foregoing is a true and correct copy of a pleading and attached exhibit filed in this court on December 16, 1946 and a part of the record in the case of Craighead Rice Milling Company, a Corporation, v. New Amsterdam Casualty Company, a Corporation, and J. M. Jack and L. M. Jack, co-partners doing business as Jack Construction Company, Civil J-444, and that no reply or answer to said amendment appears in the record of the District Court.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at office in the City of Jonesboro, Arkansas, This May 8th, 1948.

Grady Miller,
Clerk of the District Court of the United States for the Jonesboro Division of the Eastern District of Arkansas.
(Seal)
By Bess Mathes,
Deputy Clerk.

II.

ARGUMENT.

SUMMARY OF ARGUMENT.

A. Respondent was not barred by the temporary Assignment as Collateral.

B. The Decision of the Circuit Court of Appeals was not in conflict with other Decisions.

C. The Assignee was not an Indispensable Party.

D. The Issue Can Not Be Raised Here for the First Time.

STATEMENT OF POINTS TO BE ARGUED, WITH AUTHORITIES.

A. Respondent was not Barred by the Temporary Assignment as Collateral.

Aetna Casualty and Surety Co. v. Big Rock Stone & Mat. Co., 180 Ark. 1, 20 S. W. 2d 180;
Erie R. R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487;
Garetson-Greason Lbr. Co. v. Home Life & Acc. Co., 131 Ark. 525, 199 S. W. 547;
National Mutual Cas. Co. v. Cypret, 207 Ark. 11, 179 S. W. 2d 161;
Ocean Acc. & Guaranty Corp'n v. S. W. Bell Tel. Co., 100 F. 2d 441, cert. den. 306 U. S. 658, 83 L. Ed. 1056, 59 S. Ct. 775, 122 A. L. R. 133;
Planters Nat. Bank v. Lawrence County Bank, 176 Ark. 228, 2 S. W. 2d 704;
2 Cooley's Briefs on Insurance (2nd Ed.) 1769;
3 Cooley's Briefs on Insurance (2nd Ed.) 2900.

B. The Decision of the Circuit Court of Appeals was not in Conflict with other Decisions.

C. The Assignee was not an Indispensable Party.

Bordieu v. Pacific Western Oil Co., 299 U. S. 65, 70, 81 L. Ed. 42, 57 S. Ct. 51, 53;
Capital Fire Ins. Co. v. Langhorne (8 Cir.), 146 F. 2d 237;
Wesson v. Crain (8 Cir.), 165 F. 2d 6.

D. The Issue Cannot Be Raised Here for the First Time.

Blair v. Osterlein Mac. Co., 275 U. S. 220, 225, 72 L. Ed. 249, 252, 48 S. Ct. 87;
Jesionowski v. Boston & Maine R. R., 329 U. S. 452, 91 L. Ed. 416, 67 S. Ct. 401;
McCandless v. Furlaud, 293 U. S. 67, 79 L. Ed. 202, 55 S. Ct. 42;
McComb v. Goldblatt Bros., Inc. (7 Cir.), 166 F. 2d 387, 389;
Mid Continent Pet Corp'n v. Keen (8 Cir.), 157 F. 2d 310;
Oklahoma v. U. S. Civil Ser. Com., 330 U. S. 127, 91 L. Ed. 794, 67 S. Ct. 775;
Pacific States Box & Basket Co. v. White, 296 U. S. 176, 186, 80 L. Ed. 138, 147, 56 S. Ct. 159;
Parker v. Motor Boat Sales, 314 U. S. 244, 86 L. Ed. 184, 62 S. Ct. 221;
Smith v. Porter (8 Cir.), 143 F. 2d 292.

A.

Respondent Was Not Barred by the Temporary Assignment as Collateral.

The "questions presented" by Petitioners all go to the idea that because the bond prohibited an "assignment" there was no cause of action. This was, of course, to be determined by the law of Arkansas: (Erie R. R. Co. v.

Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487) which is

(a) A surety bond is construed as an insurance policy: Aetna Casualty & Surety Co. v. Big Rock Stone & Mat. Co., 180 Ark. 1, 20 S. W. 2d 180.

(b) Any contract is assignable after loss: Garetson-Greason Lumber Co. v. Home Life & Accident Co., 131 Ark. 525, 199 S. W. 547; National Mutual Cas. Co. v. Cypret, 207 Ark. 11, 179 S. W. 2d 161; Planters Nat. Bank v. Lawrence County Bank, 176 Ark. 228, 2 S. W. 2d 704.

(c) The prohibition against assignments does not apply in any event to pledges or collateral agreements: 2 Cooley's Briefs on Insurance (2d Ed.) 1769; 3 Cooley's Briefs on Insurance (2d Ed.) 2900.

In Garetson-Greason Lumber Company v. Home Life & Accident Co., supra, an employee of appellant Lumber Company was injured, sued and recovered judgment. Appellant borrowed money from American Surety Company to pay the judgment and secured it by assignment of the right of action against appellee, which had insured appellant. The Court said:

> "Notwithstanding the restricted assignment clause in the policy to the effect that the policy should not be assigned without the written consent of the company indorsed on the policy by an executive officer of said company, Garetson-Greason Lumber Company had a right to assign its right of action against the Home Life & Accident Company to whomsoever it pleased. **The restriction simply prevented the assignment of the policy during its life, and had no application whatever to the assignment of a liability thereunder.** Maryland Casualty Co. v. Omaha Electric

Light & Power Co., 157 Fed. 514; McBride v. Aetna Life Ins. Co., 126 Ark. 528."

These Arkansas authorities make irrelevant the cases on assignment from other jurisdictions cited by Petitioners. See also for the general rule on assignment after loss, 122 A. L. R. 145 following Ocean Accident & Guar. Corp'n. v. Southwestern Bell Telephone Co., 100 Fed. 2d 441, Cert. den. 306 U. S. 658, 83 L. Ed. 1056, 59 S. Ct. 775, 122 A. L. R. 133. Practically all questions raised by Petitioners were decided in the Ocean Accident case, and this court found no ground for review. There is no reason for certiorari in the present litigation.

B.

The Decision of the Circuit Court of Appeals Was Not in Conflict With Other Decisions.

The "Reasons Relied on for the Allowance of the Writ" as set forth by Petitioners are simply copied from Rule 38 (5) of this Court and have no connection with the argument of Petitioners. No case is cited in conflict with the decision complained of. It is Hornbook law that parties are allowed to make their own contracts, but it is equally certain (which Petitioners ignore) that the courts have the right and duty to construe the words used, and to take into consideration the acts and conduct of the parties.

It must be borne in mind that when the assignment was made, April 25, 1946 (R. 1091, 1119-1121), the Contractor had ceased work, liens were being threatened by various material furnishers, the Surety had refused to complete, and the purpose of the instrument was to secure funds to discharge these potential liens, also the payments due on the first mortgage, all of which was made necessary by the default of Petitioners. **The loss had occurred, the con-**

tractor had defaulted, and the surety had refused to proceed or complete the building.

The decision of the Circuit Court of Appeals is strictly in line with the Arkansas authorities, and no case from any other court prior to Erie Railroad v. Tompkins (supra), affords grounds for issuance of the Writ.

When the bond was written, the word "assignment" in such contracts had a definite meaning, as construed by the courts. This meaning excluded pledges as collateral and transfers after loss. These interpretations by the courts were written into the bond itself and determined the liability of the parties thereunder—not the contentions of Petitioners.

C.

The Assignee Bank Was Not an Indispensable Party.

The statement of facts given above precludes any serious thought that the Bank was an indispensable party to the litigation. Petitioners did not so consider it, because the question was not raised in the trial court. Had the matter been a ground for complaint in the trial court, astute counsel would have raised the issue before spending two weeks trying the case before a jury. They knew the Bank had been paid, the assignment had been released, and that there was no basis for raising any such issue.

Even if the assignment had been in full force and effect at the time of trial, the Bank would not have been an **indispensable party.** It was and is a Memphis, Tennessee resident and its absence would not have destroyed the court's jurisdiction.

Bordieu v. Pacific Western Oil Co., 299 U. S. 65, 70, 81 L. Ed. 42, 57 S. Ct. 51, 53;

Capital Fire Ins. Co. of Cal. v. Langhorne (8 Cir.), 146 F. 2d 237;
Wesson v. Crain (8 Cir.), 165 F. 2d 6.

D.

The Issue Cannot Be Raised Here for the First Time.

The foregoing recitals show that the Bank was not even a proper party to the litigation at the time of trial, much less an indispensable party. Even if it was a proper party prior to the release of the assignment, Petitioners learned of the interest of the Bank in November, 1946, the case was tried in March, 1947, yet at no time was the question raised of there being any necessity for the Bank to be made a party. Following the filing of the release on December 16, 1946, Petitioners knew the Bank then had no interest. Having failed to raise the issue in the trial court, it is manifestly unfair to ask for relief on that ground here. This Court will not yield to such importunities.

Blair v. Osterlein Machine Co., 275 U. S. 220, 225, 72 L. Ed. 249, 252, 48 S. Ct. 87;
McComb v. Goldblatt Bros., Inc. (7 Cir.), 166 F. 2d 387, 389;
Pacific States Box & Basket Co. v. White, 296 U. S. 176, 186, 80 L. Ed. 138, 147, 56 S. Ct. 159;

> "It has long been a rule of practice that a reviewing court will not consider assignments of error not called to the attention of the trial court where such matters do not concern the jurisdiction of the court. It would manifestly be unfair to hold that the trial court had erred in a matter it had not considered. Litigants are not entitled to hide a point in an obscure pleading and pre-

sent it for the first time on review, but should fully and fairly acquaint the trial court with all matters relied upon." Maloney v. Brandt (7 Cir.), 123 F. 2d 779, 782, quoted in McComb v. Goldblatt Bros., Inc. (7 Cir.), 166 F. 2d 387, 389;

McCandless v. Furlaud, 293 U. S. 67, 79 L. Ed. 202, 55 S. Ct. 42;

"But an objection to plaintiff's legal capacity to sue will not be entertained if taken, for the first time, in the appellate court. The rule is of general application and has been applied in the Federal appellate courts to a variety of cases. * * * The appellate courts have refused to entertain the objection that the plaintiff was not the real party in interest. The reason for the rule is the broad one that a defect found lurking in the record on appeal, may not be allowed to defeat recovery, where the defect might have been remedied, if the objection had been seasonably raised in the trial court."

Oklahoma v. U. S. Civil Service Com., 330 U. S. 127, 91 L. Ed. 794, 67 S. Ct. 775;

"A failure to object in the trial court to a party's capacity is a waiver of that defect."

Jesionowski v. Boston & Maine R. R., 329 U. S. 452, 91 L. Ed. 416, 67 Sup. Ct. 401;

Parker v. Motor Boat Sales, 314 U. S. 244, 86 L. Ed. 184, 62 Sup. Ct. 221.

Claim for compensation filed by widow. Argued on appeal that "legal representative" must make claim. The objection was held to be made too late as not raised before the Commission or the District Court.

Smith v. Porter (CCA 8), 143 F. 2d 292.

Appellants, just as petitioners for this writ, raised a point for the first time in their reply brief (p. 296):

> "In their reply brief, filed on the day of submission of this case, appellants, for the first time, advanced the contention that they were not compensated on a salary basis, but on an hourly wage rate * * * This point was not included in appellants' brief in the statement of points intended to be relied on * * *. It does not appear from the record that the issue was raised or relied upon in the trial court * * * In these circumstances appellants are not entitled as of right to rely upon it here."
>
> Mid Continent Petroleum Corp'n v. Keen (CCA 8), 157 F. 2d 310.

Employee's exemption from provisions of Fair Labor Standards Act, was not raised in trial court, issue was not decided there, and point was not included in points relied on in appeal, the question was held not open for appellate court's consideration.

III.

CONCLUSION.

Respondent respectfully submits that no ground has been shown by petitioner for a review by this court of the decision of the Circuit Court of Appeals. The decision is in all respects consistent with the decisions of this court, with the decisions of other Federal Courts and with the decisions of the Supreme Court of Arkansas. Petitioner apparently takes the position that simply because the surety's contract prohibited an assignment, there could be no right of action against the bond, regardless of the nature of the assignment or the time thereof or the conditions which existed or had occurred. The law does not

thus favor a paid surety. The assignment complained of was after the loss had occurred, after default by the contractor and after the surety had refused to complete the contract. The assignment was as collateral security only, it provided for release on payment of $30,000, the payment was made and the assignment was discharged nearly three months before the trial. No question of defect of parties was raised in the lower court, the assignee had no right, title or interest in the matter at the time of trial, and the plea made to the jurisdiction of the court is frivolous.

CHARLES FRIERSON,
JOE C. BARRETT,
ARCHER WHEATLEY,
Counsel for Respondent Craighead
Rice Milling Company.